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"There is no explicit rule that prohibits espionage. But that doesn't mean it's allowed."

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Is it against international law to spy on mobile phone conversations of foreign heads of government?

Wiretapping is not per se regulated by international law; there is no explicit rule that prohibits espionage. But that doesn't mean it's allowed. Likewise, just because all countries are spying, you cannot conclude that there is a rule of customary international law that allows them to do so. The states know that spying is problematic. That's why they do it secretly.

Is there an indicator in international law that these practices are illegal?

These practices may infringe on general principles of international law, such as the principle of state sovereignty. One facet of state sovereignty provides for non-interference in internal affairs. The internal communication between politicians, public officials and state authorities is part of those internal affairs. If public officials can't have a confidential phone conversation anymore, this aspect of the sovereignty principle in international law is being violated. Another principle that could be affected is the distribution of state authority.

What do you mean by that?

As a general rule, a state is bound to its territory when it comes to the exercise of public authority. State-initiated wiretapping is an act of public authority. In Switzerland, it is illegal if somebody exercises acts on Swiss territory that would normally be acts of public authority. However, international law does allow for the extraterritorial exercise of public authority if there is a connection to the state. Persons can be such a connection, e.g. citizens abroad. In our context, such a connection would – if at all – be possible only in accordance with the effects doctrine. The US may be permitted to intervene if a set of events has consequences for and effects within the US. They fear terrorist and other criminal attacks on their state or their citizens. Such attacks could be seen as effects that affect the distribution of authority. But these are far-flung and hypothetical effects and quite possibly not covered by the effects doctrine. Then, they remain problematic under international law as an extraterritorial exercise of public authority.

Rumor has it that the NSA is operating from the American embassy in Berlin. Would that be a possible connection, too?

Such operations violate the Vienna Convention on Diplomatic Relations. The convention regulates embassies' tasks. Such tasks include of course information gathering. But the convention explicitly states that information may only be obtained through "lawful means". In Germany, secretly wiretapping into phone conversations is a criminal offence. So is spying out state secrets. If the embassy is really involved, then I would say there is a clear violation of international law.

How about legal consequences? Could one obtain a judgment against the US?

There is no compulsory jurisdiction in international law. Germany cannot automatically reach out to an international court and sue the US. The US has not generally recognized the compulsory jurisdiction of the International Court of Justice in The Hague.

If the embassy turns out to be involved, does this still hold true?

Many states parties to the Vienna Convention on Diplomatic Relations have signed an ratified an optional protocol that provides for the compulsory jurisdiction of the ICJ for all disputes arising out of the interpretation or application of the Convention. The US are still party to this optional protocol, unlike in

the case of the Optional Protocol to the Vienna Convention on Consular Relations. If the embassy turns out to be involved, Germany – likewise a party to the Protocol – could lodge an application with the ICJ, asking for a review of a possible violation of the Convention on Diplomatic Relations.

The German historian Josef Foschepoth claims that the NSA wiretaps are all covered by agreements concluded between Germany and the US in the 1950s and 1960s, when NATO troops were stationed in Germany. Is that true?

I don't think it is, but it is hard to tell. Foschepoth mentions three agreements; two are not publicly available, but reprinted in Foschepoth's documentary annex. In my opinion, these complex agreements do not provide a justification for wiretapping activities. There is an exchange of diplomatic notes dating back to 1968 concerning the monitoring of postal and telecommunications operations. This exchange of notes reaffirms a supposed principle of international law that provides for any military commander to take all appropriate and necessary measures in case there is an immediate threat to their military force. There are precautions: measures may only be taken in case of an immediate threat and only appropriate and necessary measures are allowed. These limits follow a similar logic as limits on the lawful restriction of human rights. In any event, they don't provide you with a free pass. The NSA would need to prove first that these requirements are satisfied.

Wiretapping the chancellor's cell phone is one thing. The fact that we are all continuously spied upon is quite another. What does international law have to say with regard to the NSA's general wiretapping activities in Germany?

There is a human right to privacy. Of course, public officials such as chancellor Merkel also benefit from human rights. While they have to put up with greater restrictions because they are part of public life, that does not mean that everything goes. Chancellor Merkel has a right to privacy, even when she uses her work phone.

Are the US bound by international law to respect the right to privacy?

Yes, they are. They have ratified the International Covenant on Civil and Political Rights, and this covenant contains a right to privacy in its article 17. But the US government has deposited a declaration saying that the covenant shall not be self-executing, meaning that it cannot be enforced by US courts. But that doesn't change the fact that the US, as a state, is bound to the covenant.

But isn't this obligation only valid on US territory?

Yes, in principle that is true. But the covenant also protects persons under the jurisdiction of the US, and personal jurisdiction can exist outside state territory as well. But personal jurisdiction presupposes control over the person in question. A classic example is the detention of a person abroad or on the high sea, e.g. in case of a piracy suspect on a police boat. Cyber control is of a different quality of course. It is not decided yet whether it could also provide for the extraterritorial application of human rights. I would argue that this should be conceivable in our cyber age.

If human rights apply, would my right to privacy be violated if the NSA wiretapped me?

The right to privacy can be restricted if there is a legal basis that pursues a legitimate aim and if the restrictions are proportionate. A legal basis exists, either under US law or maybe even in the form of those agreements with Germany. Combating terrorism is certainly a legitimate aim. But as far as I can assess the facts, I would argue that scanning everything is too general of a measure. It is more than a necessary measure in order to effectively counter the threat, and therefore disproportionate.

Does the German government have a legal obligation to protect me from such infringements, even at the expense of good diplomatic relations with the US?

Yes. Germany is bound by the fundamental rights enshrined in the basic law and by the European Convention on Human Rights. These rights entail an obligation to protect. And this obligation to protect might entail an obligation to proceed against the US. States cannot use international law obligations from some secret agreement to justify a breach of their ECHR obligations. There is no flight into international law.

What types of acts could result from an obligation to proceed against the US? Are there specific requirements?

Not necessarily. To give an example, the European Court for Human Rights ruled on a case where someone was imprisoned in Transnistria, the part of Moldova under partial rule of former Soviet army forces. The Court stated that Moldova had to undertake diplomatic action. Diplomatic action means negotiations. There is no possibility to be more specific. If steps are taken, they must not burden the state too much; at the same time, they need to be effective and shouldn't fall short of a certain minimum. To write a single letter may not be sufficient…

… or sending the interior minister to Washington one time?

Exactly.

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